

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
VINCENT EBHOJIAYE	:	DETERMINATION
	:	DTA NOS. 819155 AND 819156
for Revision of Determinations or for Refund of Motor	:	
Fuel Tax, Tax on Petroleum Businesses and Sales and	:	
Use Taxes under Articles 12-A, 13-A, 28 and 29 of the	:	
Tax Law for the Period August 1, 1999 through	:	
August 31, 1999.	:	

Petitioner, Vincent Ebhojiaye, 7320 Oakcrest Drive, New Carrollton, Maryland 20784, filed a petition for revision of determinations or for refund of motor fuel tax, tax on petroleum businesses and sales and use taxes under Articles 12-A, 13-A, 28 and 29 of the Tax Law for the period August 1, 1999 through August 31, 1999.

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on June 10, 2003 at 10:30 A.M., with all briefs to be submitted by September 5, 2003, which date began the six-month period for the issuance of this determination. Petitioner appeared by James O. Druker, Esq. The Division of Taxation appeared by Mark F. Volk, Esq. (Margaret T. Neri, Esq., of counsel).

ISSUE

Whether petitioner, an officer of United Petroleum Company, Inc., is liable for motor fuel tax, tax on petroleum businesses and sales and use taxes arising from the sale of heating oil by a third party using the corporation's New York State heating oil distributor license.

FINDINGS OF FACT

1. On September 7, 2001, the Division of Taxation (“Division”) issued to petitioner, Vincent Ebhojiaye, as a responsible person, two notices of determination assessing a penalty equal to the motor fuel tax and tax on petroleum businesses owed by United Petroleum Company, Inc. for the period ended August 31, 1999. The notices indicate motor fuel tax due of \$49,717.16 and tax on petroleum businesses due of \$76,129.41.

On the same date, the Division issued to petitioner, as a responsible person of United Petroleum Company, Inc., a Notice of Determination assessing sales and use taxes due of \$29,820.00, plus penalty and interest, for the period ended August 31, 1999.

2. Petitioner, Vincent Ebhojiaye, came to the United States from Nigeria in 1979 at the age of 27. He became a naturalized citizen in 1994. Prior to arriving in this country petitioner had obtained a bachelor of arts degree in accounting and a master’s degree in finance. During the year of his arrival in the United States, he became affiliated with United Petroleum Company, Inc., after having met Tony Opabajo. At the time of his introduction to Mr. Opabajo, petitioner was a taxicab driver in the Washington, D.C. area. Mr. Opabajo informed petitioner that he was in the oil business and hired petitioner to work for him. Initially, it was petitioner’s understanding that he was to be an employee of United Petroleum, assisting Mr. Opabajo in the operation of the business. However, soon after joining the business operation, petitioner invested money in and became a shareholder of United Petroleum Company, Inc., a business venture involved in the sale and distribution of heating oil and diesel fuel to municipalities in the Washington, D.C. metropolitan area. United Petroleum was located in Laurel, Maryland.

3. During 1994, following negotiations in which both petitioner and Mr. Opabajo participated, United Petroleum obtained a contract to supply heating oil to the City of New York

for use in buildings for the homeless. However, United Petroleum did not own storage tanks in which to store the product or vehicles registered to transport the product in New York State. In order to fulfill its contractual obligations, United Petroleum entered into a contract with Ark Transportation, Inc., located in Inwood, New York, which would use its facilities to store the product and its vehicles to deliver the product to United Petroleum's customers in New York City. Ark Transportation was not registered as a distributor of motor fuel in the State of New York. Ark Transportation was owned by William Nappo, who encouraged Mr. Opabajo and petitioner to register United Petroleum as a vendor and importer of diesel motor fuel in New York State.

4. In July 1994, the corporation applied to the New York State Department of Taxation and Finance for registration as a distributor of heating oil only. On the registration application, petitioner appears as the vice-president and 40-percent shareholder of the corporation. United Petroleum filed another application in July 1995 seeking to register as an importer of diesel motor fuel. As before, petitioner appears as the vice-president of the corporation and his duties are listed as the person responsible for the filing of tax returns and the remittance of taxes on behalf of United Petroleum. Petitioner also had check-signing authority with the corporation.

At the application interview which was conducted by New York State to determine whether to license United Petroleum as a distributor of diesel motor fuel, petitioner and Mr. Opabajo were accompanied by Mr. Nappo's attorney, Marvin Kramer. Following the granting of the distributor license, and at Mr. Nappo's request, Mr. Opabajo and petitioner provided to Mr. Nappo copies of United Petroleum's financial statements and licenses, including their recently obtained license as a New York distributor of diesel motor fuel.

5. In February 2000, the Division commenced an audit of United Petroleum by sending to the corporation an appointment letter requesting that it make available its books and records for review. A second appointment letter was sent in April 2000. Over several days during June 2000, the auditor reviewed the available tax returns, books, records and invoices. A review of the petroleum business tax returns and the diesel motor fuel returns filed monthly by United Petroleum during the course of 1999 revealed that beginning with the returns of February 1999, United reported 420,000 gallons of diesel motor fuel in its inventory. In its August 1999 returns, United reported a sale of 420,000 gallons of diesel motor fuel to Ark Transportation. It is noted that all of the monthly tax returns filed by United Petroleum in 1999 were signed by petitioner as vice-president of the corporation.

6. As Ark Transportation was not registered as a distributor in New York State, and no documentation was produced which established that the sale of the 420,000 gallons to Ark Transportation in August 1999 was an exempt sale, a statement of audit changes, and later notices of determination, were issued to United Petroleum indicating that motor fuel tax, petroleum business tax and sales and use taxes were due on the transaction.

7. In July 1998, Mr. Nappo purchased 420,000 gallons of heating oil from the George E. Warren Corporation located in Vero Beach, Florida. The purchase by Mr. Nappo was made under the name United Petroleum Company, Inc. using the corporation's license as a distributor of diesel motor fuel, which petitioner and Mr. Opabajo had provided to Mr. Nappo. An invoice from the George E. Warren Corporation to United Petroleum, dated August 7, 1998, indicated that a transfer of 420,000 gallons of heating oil occurred on July 12, 1998 by pipeline to a terminal located in Inwood, New York. The fax number on the invoice, purporting to be that of United Petroleum, was actually that of Mr. Nappo's business office in Inwood, New York. The

check used to pay for the 420,000 gallons of heating oil was issued on a Citibank checking account bearing the payor name of United Petroleum; however, the address on the check is the business office of Mr. Nappo, 1 Sheridan Blvd., Inwood, New York. United Petroleum has never had a business address or checking account in New York, and was not directly involved in the receipt or subsequent sale of the 420,000 gallons of heating oil shipped by George E. Warren Corporation to the terminal in Inwood, New York. It should be noted that such sale could not have taken place without the distributor license of United Petroleum which was given to Mr. Nappo by petitioner and Mr. Opabajo. When contacted, Mr. Nappo continued to inform United Petroleum that the product remained in storage in the Inwood terminal.

8. During February 1999, Mr. Opabajo instructed petitioner to report the 420,000 gallons of heating oil as part of its inventory on United Petroleum's petroleum business tax and diesel motor fuel tax returns. The 420,000 gallons were reported on United Petroleum's returns from February 1999 through August 1999. On the August 1999 returns, United Petroleum reported a sale of 420,000 gallons of heating oil to Ark Transportation. The reporting of the 420,000 gallons of product as part of its inventory and eventual sale to Ark Transportation was done in an effort to protect the corporation's distributor registration. As previously noted, all of these returns were signed by petitioner as vice-president of United Petroleum.

CONCLUSIONS OF LAW

A. Tax Law § 282-a(1) imposes an excise tax upon sales of diesel motor fuel sold in New York State, and prohibits any person from engaging in the sale of diesel motor fuel in the State unless registered as a distributor. Section 1102(a)(2) of the Tax Law provides that every distributor of diesel motor fuel shall pay, as a prepayment on account of the taxes imposed by Articles 28 and 29, a tax upon the sale or use of diesel motor fuel in the state. Tax Law § 282-

a(2) allows for the registration of a distributor of diesel motor fuel as a retailer of heating oil only, if such distributor makes sales of diesel motor fuel to consumers solely for heating purposes. Notwithstanding that such distributor may be registered for retail sales of heating oil only, the full registration provisions of Tax Law § 283 are applicable to such registration of retailers.

B. Tax Law, article 12-A, § 282-a(2), provides, *inter alia*, for the issuance of a registration as a distributor of diesel motor fuel, under which a registrant is allowed to enhance diesel motor fuel, sell or use diesel motor fuel, import diesel motor fuel into the State or produce, refine, manufacture or compound diesel motor fuel within the State. Section 282-a(2) makes the full registration review provisions of Tax Law § 283, relating to motor fuel distributors, also applicable to the licensing of diesel distributors, as follows:

No person shall engage within this state in the enhancement of Diesel motor fuel, make a sale or use of Diesel motor fuel (other than a retail sale not in bulk . . .), import or cause the importation of Diesel motor fuel into the state . . . unless such person shall be registered by the department of taxation and finance as a distributor of Diesel motor fuel All the provisions of section two hundred eighty-three of [Article 12-A] shall apply to applicants for registration and registrants with respect to Diesel motor fuel, and, in addition, distributors with respect to Diesel motor fuel shall be subject to all other provisions of [Article 12-A] relating to distributors of motor fuel, including but not limited to, the keeping of records, the fixing, determination and payment of tax and filing of returns.

C. Subdivisions (2) and (4) of Tax Law § 283 enumerate certain factors which must be considered by the Division upon its review of an application for registration as a motor fuel distributor. Tax Law § 283(2) lists numerous grounds that are to be applied to the person or entity filing the registration, any officer, director or partner of such applicant, any shareholder directly or indirectly owning more than ten percent of the number of shares of stock of such applicant entitling the holder thereof to vote for the election of directors or trustees, or any shareholder or employee of such applicant under a duty to file a return under or pursuant to the

authority of article 12-A on behalf of such applicant. These grounds are to be considered by the Division in its review of an application for registration. The grounds include the failure to pay a tax determined to be due, the failure to pay a penalty provided for under Tax Law § 289-b(2) and determined to be due, the conviction of a crime provided for in the Tax Law within the preceding five years, the cancellation or suspension of a registration to distribute motor fuel within the preceding five years and the violations enumerated in Tax Law § 283(4).

D. Tax Law § 283(4) lists certain acts as grounds upon which the Division may cancel the registration of a diesel motor fuel distributor, including the registration as a retailer of heating oil only, as follows:

The registration of any distributor may be canceled or suspended by the commissioner where a registrant, or an officer, director, shareholder, employee or partner of the registrant who as such officer, director, shareholder, employee or partner is under a duty to act for such registrant or any shareholder directly or indirectly owning more than ten percent of the number of shares of stock of the registrant . . . fails to file a bond or other security when required or when the amount thereof is increased . . . or fails to comply with any of the provisions of this article [Article 12-A, Tax on Gasoline and Similar Motor Fuel] or article twenty-eight of this chapter [Sales and Compensating Use Tax] with respect to motor fuel or any rule or regulation adopted pursuant to this article or article twenty-eight of this chapter with respect to motor fuel . . . , or knowingly aids or abets another person in violating any of the provisions of such articles or of any such rule or regulation with respect to motor fuel, or transfers its registration as a distributor without the prior written approval of the commissioner. A registration may also be canceled or suspended if the commissioner determines that a registrant or an officer, director, shareholder, employee or partner of the registrant who as such officer, director, shareholder, employee or partner is under a duty to act for such registrant or any shareholder directly or indirectly owning more than ten percent of the number of shares of stock of the registrant (where such registrant is a corporation) entitling the holder thereof to vote for the election of directors or trustees of such registrant:

(i) commits fraud or deceit in his operations as a distributor or has committed fraud or deceit in procuring his registration;

(ii) has been convicted in a court of competent jurisdiction, either within or without the state, of a felony, within the meaning of subdivision eight of this section, bearing on such distributors's duties and obligations under this chapter;

(iii) has knowingly aided and abetted a person who is not registered as a distributor in the importation, production, refining, manufacture or compounding of motor fuel;

(iv) has impersonated any person represented to be a distributor under this article but not in fact registered under this section; or

(v) has knowingly aided and abetted the distribution of motor fuel imported, caused to be imported, produced, refined, manufactured or compounded by a distributor who is not registered by the department of taxation and finance.

A registration may also be canceled or suspended if the commissioner determines that a registrant or an officer, director, shareholder, employee or partner of the registrant who as such officer, director, shareholder, employee or partner is under a duty to act for such registrant or any shareholder directly or indirectly owning more than ten per cent of the number of shares of stock of the registrant . . . , was an officer, director, shareholder, employee or partner of another person who as such officer, director, shareholder, employee or partner was under a duty to act for such other person or was a shareholder directly or indirectly owning more than ten percent of the number of shares of stock of such other person (where such other person is a corporation) entitling the holder thereof to vote for the election of directors or trustees of such other person at the time such other person committed any of the acts or omissions which are, or was convicted as, specified this subdivision within the preceding five years.

E. In recent years, the Legislature has enacted an elaborate system concerning registration, licensing and record keeping with respect to persons engaged in manufacturing, importing, selling, distributing and transporting motor fuel and diesel motor fuel in New York State. The intent behind this system, specifically as it relates to registration, was discussed in *Matter of Diamond Terminal Corporation v. Dept. of Taxation & Finance* (158 AD2d 38, 557 NYS2d 962, *lv denied* 76 NY2d 711, 563 NYS2d 767), where the Court observed with regard to Tax Law § 283-b that:

the bill would enable [the Commissioner] to examine more closely the persons involved in the importation process . . . by expanding the provisions of law regarding the registration of distributors and the cancellation and suspension of registrations. The expanded provisions would permit an examination into the character of the persons controlling the distributor and would make it more

difficult to circumvent the statutory standards (Mem of Commissioner of Taxation and Finance, Governor ' s Bill Jacket, L1986, ch 276).

F. In *Matter of Diamond Terminal Corporation* (Tax Appeals Tribunal, September 22, 1988), the Tribunal found that the revision of Article 12-A by the Laws of 1986 (ch 276) was the “culmination of legislative and executive efforts to combat massive evasion of the excise and sales taxes imposed on motor fuel by Articles 12-A and 28 pursuant to the authority of Article 29 of the Tax Law.” In *Matter of OK Petroleum Products Corp.* (Tax Appeals Tribunal, November 1, 1990), the Tribunal stated the following with respect to the registration provisions of Tax Law Article 12-A:

[C]hanges to the registration provisions for distributors were enacted which allowed the Division of Taxation to refuse to register a distributor and to cancel or suspend a registration under certain conditions (Tax Law §283[2] and [4]). The obvious intent of the change in the registration provisions was to provide the Commissioner with the opportunity to decide whether the distributors who would be receiving tax moneys and holding them in trust until paid over to the State could be relied upon to properly exercise their tax collection responsibilities (*see*, Memorandum of State Department of Taxation and Finance, McKinney’s Session Laws, 1986, ch 276, at 2882). In 1988 similar legislative changes were made to address evasion and avoidance of the tax imposed on diesel motor fuel (L 1988, ch 261, sections 67-105).

The legislative intent for the expansion of Tax Law § 283(2) indicates that the subsection “is expanded to generally encompass an examination of the character and suitability of responsible officers . . . of the applicant, and to further enumerate acts which reflect negatively on character and suitability.” Pursuant to *OK Petroleum Products Corp. (supra)*, the issue to be decided in a registration matter is whether an applicant can be relied upon to properly exercise its responsibilities as a distributor.

G. In order to try to eliminate the evasion of motor fuel taxes in New York, the Legislature imposed an elaborate system of registration, licensing and record keeping on all

persons engaged in manufacturing, importing, selling, distributing and transporting motor fuel and diesel motor fuel in New York State. The licensing and registration provisions are necessary parts of this scheme, and are not mere legal technicalities to be ignored without consequence.

H. The actions of petitioner and Mr. Opabajo, shareholders and operators of United Petroleum, in providing Mr. Nappo with their registration as a distributor and financial statements allowed Mr. Nappo to completely circumvent the statutory and regulatory scheme put in place by the Legislature and the Division to allow a thorough review of the applicants attempting to obtain registration as motor fuel distributors. The purpose of this review is to provide the Division with the means to insure that distributors responsible for the collection and payment of taxes can be relied upon to carry out their tax obligations. It was also an attempt to curb the extensive amount of tax evasion that was occurring in the motor fuel industry. By providing such information to Mr. Nappo, United Petroleum actively contributed to the undermining of the Division's ability to regulate which entities would be granted registration and also contributed to Mr. Nappo's avoidance of the taxes due on the transfer of the 420,000 gallons of product from George E. Warren Corporation to Ark Transportation. That the owners of United Petroleum were not aware of the transaction until after it had occurred, or that they were not aware of Mr. Nappo's intentions when he requested their registration, does not relieve United Petroleum of the responsibilities attached to the use of their registration which they voluntarily gave to a person or entity not registered as a distributor of diesel motor fuel.

I. During the relevant period, petitioner was the vice-president of United Petroleum, as well as an investor and shareholder. Petitioner signed the tax returns, had check-signing authority and appeared on behalf of the corporation during contract negotiations and the application process for the distributor license. Taken together, petitioner is considered to be a

person responsible for the collection and remittance of taxes on behalf of United Petroleum (*Hopper v. Commissioner of Taxation and Finance*, 224 AD2d 733, 637 NYS2d 494, *lv denied* 88 NY2d 808, 647 NYS2d 713; *Matter of Wendel*, Tax Appeals Tribunal, February 3, 2000).

J. To allow United Petroleum to escape responsibility for the taxes arising from the transaction between the George E. Warren Corporation and Ark Transportation where it provided the means by which Ark Transportation was able to evade the taxes due, would be to effectively undermine the statutory scheme that was put in place to address the problem of such tax evasion in the motor fuel industry. United Petroleum, by providing Mr. Nappo with its registration as a motor fuel distributor, caused the 420,000 gallons of heating oil to be imported into New York State (Tax Law § 282[1][a]; § 300[b]; § 1102[a][1]), and is therefore liable for the taxes due under Articles 12-A, 13-A, 28 and 29 of the Tax. As a responsible person of United Petroleum, petitioner is liable for the taxes and the penalties due (Tax Law § 289-b[2]; § 1131[1]; § 1133; § 1138).

K. The petition of Vincent Ebhojiaye is denied, and the three notices of determination, dated September 7, 2001, are sustained.

DATED: Troy, New York

February 26, 2004

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE